No. 8306.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

TAKACHIHO SHOSEN KABUSHIKI KAISHA LTD. (UNITED OCEAN TRANSPORT CO.),

Claimant and Appellant,

THE JAPANESE MOTORSHIP "KOYEI MARU", her motors, tackle, apparel and furniture,

Respondent,

vs.

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Libelant and Appellee.

TAKACHIHO SHOSEN KABUSHIKI KAISHA LTD. (UNITED OCEAN TRANSPORT CO., LTD.),

Libelant and Appellant,

vs.

THE AMERICAN TUG "DAVID P. FLEMING", her motors, tackle, apparel and furniture, etc., and THE SCOWS P. S. B. & D. CO. NO. 13, PIONEER NO. 11 and W. T. CO. NO. 14,

Respondents,

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Claimant and Appellee.

PACIFIC VEGETABLE OIL CO., INC., a corporation, and five others, owners and consignees of cargo laden on board the Japanese Motorship "KOYEI MARU",

Libelants and Appellants,

vs.

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Respondent and Appellee.

REPLY BRIEF ON BEHALF OF APPELLANTS, PACIFIC VEGETABLE OIL COMPANY, ET AL. (CARGO INTERESTS).

ALFRED T. CLUFF,

SAWYER & CLUFF,

Garfield Bldg., 403 W. 8th St., Los Angeles, Cal.,

Proctors for Libelants and Appellants, Pacific Vegetable Oil Co. Inc., et al.

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I.

Application of the Major and Minor Fault Rule Should Result in Exonerating the "Koyei Maru" and Not the "David P. Fleming."

Counsel for the "DAVID P. FLEMING" seek absolution for her sins by invoking the so-called "major and minor

fault" rule. We agree that the rule may properly be applied to the case, but if it is applied it reacts very much to the detriment of the "FLEMING."

The major and minor fault rule is applied when there is evidence, either undisputed or so clear and convincing as to admit of no reasonable doubt, of a definite fault on the part of one vessel, which in itself is sufficient to account for the collision. When such a situation appears, evidence tending to show fault on the part of the other vessel, which does no more than create a doubt as to the propriety of her conduct, will not be deemed sufficient to support a decree for divided damages.

As stated in our first brief, it is not the function of the cargo interests to defend the "KOYEI MARU," but, we confidently assert, if the test of the major and minor fault rule is applied to this case, it exonerates, not the "FLEMING" and her owners, but the Japanese vessel.

We must look first for the primary and essential fault which directly caused the collision. We cannot find it in any of the charges laid against the "KOYEI MARU." On the contrary, we do find it in the undisputed and admitted fact that the "FLEMING'S" lights were in violation of the express provisions of the International Rules.

At 2:06 A. M. the lights of the "FLEMING" said to the "KOYEI MARU": "Here am I, a tug, with a tow of one unit. You are not overtaking; I am crossing. The dark object astern of me is my tow. I am turning my searchlight on it. Go astern of it."

There is the *major* fault. The unscreened range light was plainly in violation of the law. The violation is un-

disputed and admitted. It cannot be disputed that it and the stern light together conveyed a misleading message. It cannot be disputed that the Koyei Maru relied upon that message.

Let us assume, argumentatively, that the conduct of the Koyei Maru is open to criticism in one or more of the respects discussed on page 6 *et seq.* of the reply brief. Let us look at those charges of fault in brief detail.

1. *That as an overtaking vessel she failed to keep clear.* If she did so fail, whose fault was it? She was not bound as an overtaking vessel until it was brought home to her that she was in an overtaking situation. The lights displayed from the Fleming did not indicate an overtaking situation. They indicated quite the contrary. They showed what were apparently towing lights, and admittedly towing lights cannot be seen if the situation is an overtaking one. When the searchlight was played on the first scow it showed in which general direction the tug and tow were heading,—toward the south and west. Thus, on the basis of the lights alone, it was a crossing situation, with the Koyei Maru the privileged vessel.

If the situation was in fact an overtaking situation, the fact was not brought home to the Koyei Maru until 2:08, and then it was not because of the Fleming's lights, *but in spite of them.*

It is therefore apparent that the primary cause of the Koyei Maru overtaking and colliding with the flotilla was not negligence on *her* part, but misleading lights.

2. *That she failed to distinguish lights on the scows or to hear the tug's danger signals.* The evidence as to the lights and as to the signals is at sharp conflict. Maybe the KOYEI MARU was careless in failing to distinguish lights;—maybe the lights were not lit or were not of sufficient brilliance to be seen. Maybe danger signals were blown, as testified by the tug's witness,—maybe they were not. Certainly there is no such proof against the KOYEI MARU that the court may unhesitatingly lay a finger on these points and say "This of itself clearly accounts for the collision."

3. *That she did not have a proper lookout.* The FLEMING'S whole point here is that the first officer on the forecastle head might have been called upon to perform other duties. The evidence shows, however, that he wasn't so called upon, and was devoting all his attention to looking out. If this is a fault, it is a very technical one, and one which certainly contributed in no way to the collision.

4. *That she failed to stop when she saw lights ahead which she could not identify.* Whose fault was it that she could not identify the lights? Maybe the KOYEI MARU was not altogether prudent in not immediately stopping and reversing when she saw the blur of lights on her starboard hand at 2:04 A. M. Here again the primary fault is the fact that the lights were not identifiable.

Summarizing the charges of fault against the KOYEI MARU, we find two which were primarily brought about by the FLEMING'S misleading lights; one upon which the evidence is almost evenly balanced; and one which is a purely technical concept and which could not have con-

tributed to the collision. In all respects the existence of fault is vigorously denied by the KOYEI MARU and the denials supported by cogent evidence. On the other hand, we have the glaring fault in the FLEMING'S lights, which fault is admitted.

We think the conclusion is inescapable that this glaring and admitted fault on the part of the FLEMING was of itself sufficient to account for the disaster, whereas the disputed charges of fault against the KOYEI MARU go no further than to raise possible doubts as to the propriety of her conduct. We submit that if either vessel is to be exonerated on the basis of the major and minor fault rule, it should be the KOYEI MARU.

II.

The "Fleming's" Display of Improper Lights Did Contribute to the Collision.

It is not and cannot be disputed that the FLEMING'S unscreened range light, in conjunction with her stern light, displayed toward all points on the FLEMING'S quarter two white lights in vertical line. The meaning of such a display of lights has been stated in this case so often that there is no need for repetition here.

On page 29 *et seq.* of the reply brief, counsel seek lamely to escape the consequences of this violation of law by what they term "some sensible, practical consideration."

They say that the tug's lights complied with the Inland Rules, and that it is inconvenient and not customary for vessels to change lights when they cross the line between inland and international waters. Counsel themselves supply the answer to these considerations when they admit

that custom and difficulty of compliance provide no legal excuse for violation of law. The tug was navigating in international waters, and when it failed to comply with the International Rules it did so at its peril. This Japanese master was not charged with the duty of knowing the Inland Rules. He *was* charged with the duty of knowing the International Rules and of complying with them in international waters. He had the right to expect that other navigators should also comply with them.

It is then suggested that other lights which the FLEMING would have been entitled to carry and did not carry might have been so arranged as to show two vertical white lights in line. It is said that lights from her engine room might have shown through her windows, and that she was entitled by law to carry a small white light abaft the funnel or after mast, for her tows to steer by. It is said that if she had carried such a light in addition to her stern light, it might have had the effect of two lights vertically in line.

Counsel fail to state their theory of the function of the stern light which the FLEMING admittedly did carry, but we take it, if the question is pressed, they will answer that the stern light was not a "steering light" under Article 3 of the International Rules, but an overtaking light under Article 10 of the rules. The tug, they will say, is authorized by Article 3 to carry a steering light, and *any* vessel is authorized by Article 10 to carry a fixed light astern for an overtaking light. *Ergo,* a tug may carry two white lights and may, if it wishes, arrange them one above the other.

If counsel are serious in advancing this contention, they must deem their plight to be indeed desperate.

There is no practice ever known to the sea under which a tug carries two white lights astern. It is too clear for argument that the makers of the rules never intended the permission of Rule 10 to apply to a tug already carrying a stern light under Rule 3. One light fully serves both purposes. We ask the court to imagine the confusion which would result from the navigation of a tug showing two towing lights forward, and two similar lights aft.

The next practical consideration urged is that the tug's range light and stern light in vertical line would not have indicated a tug with a single tow unless a side light also showed. They wave aside the testimony of Captain Watanabe and the second mate, Honda, as to the momentary showing of a green light on the tug at 2:06 A. M. as being incapable of belief, and say that without a showing of the green light the KOYEI MARU could not have been misled.

Then they call attention to the testimony of their expert, Captain Jorgensen, who said, in effect, that two lights did not mean a tug and tow unless he definitely saw a side light as well. This ridiculous statement demonstrates the utter uselessness of partisan expert testimony in collision cases.

Two white lights in vertical line mean tug and tow the world over. Furthermore, they mean a tug and a single tow, or a tow less than 600 feet long. A side light tells nothing whatsoever about the character of the vessel. It neither adds nor subtracts from the identification. A side light indicates nothing but approximate course. We submit the only intelligent interpretation which any shipmaster can put upon two vertical white lights in line is that there is a tug with a single tow, which for some reason or other is not showing a side light.

The discussion and diagram on pages 34-35 of the reply brief are designed to prove nothing more than that the green light of the tug could not have been visible from the Koyei Maru. It is of very little consequence whether it could or not. Both the master and the mate thought they saw the green light and probably they did. If they did, it told them nothing more than that the course of the vessel was somewhere between south and west, and the tug's searchlight played on the first barge told them that. The diagram and discussion require no comment, except to point out that they were prepared upon the assumption that the Fleming was pursuing a due south course. The only evidence in that respect is the tug's master was running due south by the tug's steering compass, and he admitted he did not know the deviation of that compass. The weight of evidence indicates that the Fleming's true course was considerably west of south. If, on the appellee's diagram, the Fleming's course is laid a point or two west of south, the whole argument fails.

Lastly, it is urged that if the Fleming's range light had actually been screened, only the stern light would have been visible to the Koyei Maru. It was helpful, counsel say, for the Koyei Maru to see two lights rather than one, for if she had seen one, "Heaven alone knows whether she would have ever reversed or dropped anchor, and a head-on collision with one of the scows would have resulted."

Lacking omniscience, we cannot tell what the master of the Koyei Maru would have done if he had seen only a single light on the Fleming instead of the two lights in vertical line. Neither can the court. We do know,

however, that he would not have been misled and he would not have relied upon a false message.

We submit here is the complete explanation of the collision: The lights of the FLEMING said one tow. At 2:06 A. M. the searchlight from the tug pointed out the tow. The KOYEI MARU's master relied upon the false message, tried to pass astern of the single tow thus indicated, and ran into still another tow. It may be that the KOYEI MARU's conduct was not irreproachable. From the standpoint of the FLEMING's liability it is immaterial whether it was or not. The glaring fault on the FLEMING and its causal connection with the collision cannot be missed.

We refrain from a detailed discussion of the cases cited on page 37 of the reply brief. We have read them with care and they all have one point in common. In those cases the defective lights of the involved vessels were not factors in the collisions. No one was misled thereby or could be misled. The navigators on the other vessels knew or should have known, wholly aside from the improper lights, what the situation was.

A situation where a vessel may be carrying improper lights which do not contribute to a collision can readily be conceived. If an approaching vessel can be clearly seen, and its character and course ascertained without reference to its lights, it makes no practical difference what lights it is carrying. It may have none at all or be lit up like an electric sign. In such case the lights are not a factor in the situation. In this case the waters which were the theater of the collision were in absolute darkness. It was by lights, and lights alone, that the characters and courses of the approaching vessels could

be ascertained. The tug's lights were improper and misleading, and they did mislead. They could not have helped but mislead.

The rule is that where a vessel is guilty of statutory fault, it has the burden of showing not only that its fault might not have been one of the causes of the collision or that it probably was not, *but that it could not have been one of the causes.* The FLEMING cannot sustain that burden.

III.

The Evidence as to Scow Lights and Whistle Signals.

We are by no means insensitive to the very positive testimony by the three witnesses on the tug as to the preparation of the lights on the scows, and that they were at all times observable. The same is true as to the testimony as to the repeated danger signals blown by the FLEMING.

This testimony certainly was most positive as to a lot of things. The story of each witness "clicked" with that of his fellows like the goose-step of Prussian guards. On the other hand, there is convincing testimony from the KOYEI MARU that cannot be waved aside with the bare statement that it is "negative." The four officers of the KOYEI MARU were in a position to see the lights which were displayed. Their testimony is not that they merely failed to see lights. They did see them. They saw the blurry lights of the tug as soon as they came around the

breakwater, and the two dim lights to port, which later turned out to be the last two scows. They were watching the situation with the greatest diligence from that time until the very moment of impact. Three of them at least were using binoculars and glasses. The necessary inference from this testimony is that they were fully diligent and that they saw all the lights that were *seeable*.

Counsel wax sarcastic over the testimony from the KOYEI MARU'S witnesses that the appearance of the lights on the last two scows changed from white to green just before the collision. An exactly similar phenomenon was noted in the case of *The Narragansett,* 11 Fed. 918 (cited in our first brief). The perfectly reasonable explanation is that the lights were too dim to show their green color until close approach.

Counsel assert that the scow lamps (which are in evidence) are so constructed that if the chimneys were smoked they would undoubtedly be smoked so as not to show either ahead or to the side. The lamps have flat wicks, and it can readily be demonstrated that a flat wicked lamp smokes at the edges of the wick, and the chimneys will be discolored at the points nearest to the edges.

We repeat, no witness on the FLEMING ever had an opportunity to observe how the scow lights appeared from a point of view to starboard. The KOYEI MARU'S witnesses did. Which set of witnesses was in a better position to see how they appeared?

In their opening brief, counsel for the KOYEI MARU suggested that the testimony of the *post litem motam* experiment by Captains Johnson and Jacobsen with the scow lights was entitled to little weight. We suggest it is entitled to *no* weight. It shows nothing more than that the lights were clean and properly trimmed on the night of the experiment. It shows nothing as to their condition on the night of the collision.

We submit the conflicting testimony as to the lights presents no occasion for the application of an assumption that positive testimony outweighs negative. All the evidence is "positive." It is for the court to say which testimony is most convincing.

A word may be in order regarding the alleged danger signals.

There is no such thing as a danger signal by whistle in international waters. The several short blast rule is an inland rule.

If the series of whistles were blown, as testified to by the tug's witnesses, it is almost inconceivable that they weren't heard on the KOYEI MARU, at the lighthouse and over half of San Pedro. It is inconceivable that they weren't heard by the KOYEI MARU's port pilot, who had left the vessel only a few minutes before and must have been in the vicinity. It will be recalled that immediately after the collision the tug went to the lighthouse to have a message telephoned into the office, so those at the lighthouse were immediately aware that something had hap-

pened. Knowing that a collision had taken place, it is a fair assumption that these people would have recalled that a few minutes before, a long series of danger signals had been heard. Yet these people were not called as witnesses to testify to hearing any whistle signals. The port pilot was called by the appellee, and although it is apparent from his testimony that he was doing everything in his power to help the FLEMING's cause, he did not testify to any whistle signals, which he must have heard if they were blown.

IV.

Other Faults on the Part of the "Fleming."

Appellee's counsel concede (Reply Br. 24) that under the circumstances the FLEMING was required to exercise a high degree of care in navigating its flotilla. Their answer to charges that this duty of care was violated consists entirely of irrelevant excuses, practically all of which were anticipated in our opening brief. The claim is repeatedly made,—"No regulation requires it."

As to the failure to carry attendants on the scows, it is said they were small scows, that it is not customary to carry men on them, and that it is dangerous to do so because the scows have no accommodations.

They were not small scows; they were large ones. If men are not customarily carried on such scows, they should be. If accommodations were lacking, they should have been provided.

It seems to us that the charge of fault in failing to have attendants on the scows, and the authorities supporting that charge, remain absolutely unanswered.

The same is true as to the charge of negligence against the Fleming for navigating with this unwieldy tow at the entrance to the harbor at that time of night. Certainly the operation could have been conducted in daylight and away from the entrance to the channel, and no excuse for not doing so is suggested.

The authorities cited in both of the opening briefs show that a flotilla of this character is so inherently dangerous to other navigators that it can only be tolerated if it exercises every precaution that can reasonably be taken. In the face of such a requirement, convenience, expense, or even custom, afford very poor excuses for failing to take those precautions.

Respectfully submitted,

Alfred T. Cluff,

Sawyer & Cluff,

Proctors for Libelants and Appellants, Pacific Vegetable Oil Co. Inc., et al.